SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 963

HARRY MEYER KATZ, M.D.,
Petitioner,

vs.

STATE BOARD OF MEDICAL EXAMINERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner prays that a writ of certiorari issue to review the Order of the Supreme Court of Florida filed the 10th day of July, 1968, and the Order Denying Rehearing filed the 26th day of September, 1968.

OPINIONS BELOW

The Judgment of Revocation was filed and entered by the State Board of Medical Examiners of the State of Florida on the 14th day of February, 1966. (App. C). A Motion to Reopen Hearing for Additional Testimony and Evidence was denied on the 14th day of February, 1966. The Opinion of the Circuit Court of Dade County, Florida, was filed on the 26th day of August, 1966. (App. F). It is recorded in Minute Book 761 at Page 399.

The Opinion of the District Court of Appeal of Florida, Third District, was filed August 15, 1967. Denial of Rehearing is recorded at Minute Book 875, at Page 165. The Opinion of the District Court of Appeal of Florida, Third District, is recorded at 201 So.2d 805 (Fla.App. 1967).

The Opinion of the Supreme Court of Florida was filed the 10th day of July, 1968. (App. H). Denial of Rehearing was entered the 26th day of September, 1968. The Opinion of the Supreme Court of Florida is reported at 213 So.2d 714 (Fla. 1968). (App. H).

JURISDICTION

The decision of the Supreme Court of Florida entered on July 10, 1968, became final upon denial of Petition for Rehearing on September 26, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) because a title, right, privilege or immunity claimed under the Constitution or Statutes of the United States, was denied by the Supreme Court of Florida. Jurisdiction is also invoked under Rule 19(1)(a) of the Rules of the Supreme Court of the United States, adopted June 12, 1967, effective October 2, 1967, because a State Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

FLORIDA STATUTE 458.12(1)(j)

> (1) The board shall have authority to discipline to holder of a license or other authority to practice medicine in this state, and each applicant for license, whose default has been entered or who has been heard and found guilty by the board,of any of the following:

(j) Is guilty of immoral or unprofessional conduct;

FLORIDA STATUTE 458.12(2)

(2) In disciplining any person for violating the provisions of this section, or any other statute or law of this state or any other state relating to the practice of medicine, the board may:

(a) Suspend the imposition of judgment and penalties;

(b) Impose judgment and penalties, but suspend enforcement thereof and place the licensee on probation;

(c) Suspend or limit his right to practice in this state for a period of time not exceeding two years;

(d) Revoke his license; which license may be reinstated by the board upon sufficient showing that an error was made as to evidence or to correct an injustice;

(e) Take such other action, in relation to disciplining him, as the board in its discretion may deem proper; and

(f) Withhold any license, when the same has not been delivered, either permanently or for a period of time.

FLORIDA STATUTE 458.123(1)

(1) The final order of the board in proceedings for the suspension or revocation of licenses shall be subject to review by the circuit courts of Leon

county, of the county wherein the licensee has recorded his license and has his principal professional office or of the county wherein the books and records of the board are kept.

FLORIDA STATUTE 458.123(4)

(4) Any interested party may appeal from the decision of the circuit court to the district court of appeal, first district, in the manner and within the time provided by the Florida appellate rules.

QUESTIONS PRESENTED

QUESTION ONE

AN ACCUSED DOCTOR WAS DENIED DUE PROCESS OF LAW WHEN A STATE BOARD OF MEDICAL EXAMINERS A) CONSIDERED TESTIMONY RELATING TO CHARGES OF WHICH HE HAD NO NOTICE; B) HEARD SURPRISE WITNESSES; C) REFUSED TO GRANT A CONTINUANCE TO ENABLE PREPARATION OF A DEFENSE; D) REFUSED TO REOPEN THE HEARING.

QUESTION TWO

PROCEDURAL DUE PROCESS ENTITLES A MEDICAL DOCTOR TO A JUDICIAL REVIEW OF AN ADMINISTRATIVE HEARING AND A PROCEDURE MUST BE PROVIDED TO PROVIDE SUCH JUDICIAL REVIEW OF A BOARD'S DECISION BEFORE THE DOCTOR'S RIGHT TO PRACTICE MEDICINE MAY BE WITHDRAWN.

STATEMENT OF THE CASE

HARRY MEYER KATZ, M.D., was a licensed physician practicing medicine for some ten years or more when, on April 16, 1965, certain charges alleging professional misconduct were preferred against him by the Respondent BOARD. (App. A) These charges basically alleged the performance of examinations on four individuals. The first nine counts having been dropped, two additional counts concerning the unauthorized practice of medicine by one PAUL M. BEREZNEY, M.D., in conjunction with or without the approval of DR. KATZ were subsequently filed as a part of an Amended Complaint dated September 28, 1965. (App. B)

During the relativ ly short period of time between September 28, 1956 and January 14, 1966 (the first day of the Hearing), extensive discovery was conducted and Interrogatories were propounded to the BOARD, requesting names of all witnesses.

On the basis of this information an investigation was conducted and a defense prepared. However, at the Hearing additional witnesses not previously named were called, and additional events and acts were testified to. Objection was immediately made on the basis that no reasonable opportunity had been allowed to prepare a defense to such new charges or unanticipated testimony. The BOARD overruled these objections, denied a Motion for a Continuance, and heard testimony by the witnesses not previously named concerning events not set forth in the charges, and *predicated material Findings of Fact to support the Order of Revocation on such surprise testimony.* (App. C) A Motion to Reopen the Hearing to Allow Additional Testimony was submitted, but denied. (App. C)

The Petitioner, DR. KATZ, contends that the Respondent BOARD failed to afford him a reasonable opportunity to prepare a defense to these new charges and witnesses.

Concerning the charge that DR. KATZ allowed or conspired with DR. PAUL BEREZNEY to allow DR. BEREZNEY to practice medicine, the evidence clearly disclosed that the original charges were unfounded as they pertained to FREDERICK CHATEL and GEORGE SEIFERT. The BOARD realizing this added two additional witnesses and charges on the day of the Hearing, GLORIA MATHIS and JUSTINA TROMMER. Then to further heighten the irregular procedure, under the guise of rebuttal, the BOARD called PAUL LAWRENCE BEREZNEY, JR., the son of DR. BEREZNEY and RAYMOND ALLEN GREEN, each of whom testified concerning new charges. To the original charges DR. KATZ presented witnesses and testimony which explained any suggestion of improper conduct in the matters contained in the original Complaint of Amended Complaint. (TR 239-398)

As to the testimony of the other four surprise witnesses, there was no opportunity to prepare a defense. The lack of good faith of the BOARD was manifested by the testimony of the investigator for the BOARD, MR. McCALLUM. By his own admission he had been in contact with one of the surprise witnesses, GLORIA MATHIS, some two months before the Hearing, and yet the BOARD had never given her name in Answers to Interrogatories, or filed any Amended Complaint. (TR 401-404)

PAUL LAWRENCE BEREZNEY, JR., who had twice been committed to mental institutions, testified. Prior to his testimony the BOARD determined the competency of this witness without allowing the presence of the accused or cross-examination. The witness then testified that he saw his father perform an operative procedure in front of several people, but could remember only one name, DR. HEATH. Counsel for DR. KATZ explained to the BOARD that he certainly would have had DR. HEATH present to verify his testimony, had he known of this incident, and of this witness prior to the Hearing.

Finally the BOARD brought on MR. GREEN to testify. After his testimony a continuance was again requested, but denied. Counsel then moved the BOARD to strike the testimony of all witnesses who had been objected to and refused to cross-examine MR. GREEN any further. Counsel explained he could not properly continue to represent DR. KATZ and the Hearing terminated.

An Order of Revocation followed the Hearing. A Motion to Stay was granted.

A Petition for a Writ of Certiorari, with its inherent limited application, was filed in the Circuit Court of Dade County, Florida, and denied. An Appeal was taken to the District Court of Appeal Third District and that Court refused to review the decision of the BOARD. A Petition for Writ of Certiorari was filed in the Supreme Court of Florida and denied. A dissenting opinion was filed holding that DR. KATZ had not been accorded procedural due process.

HOW THE FEDERAL QUESTION WAS RAISED

In the opening remarks of counsel for the BOARD, mention was made of new charges and new witnesses. An objection was made by counsel for DR. KATZ.

> "MR. WATKINS: Now, for purposes of the record, I know nothing of the two other patients that were admitted that counsel has adverted to. They are not covered by the Counts that we have been served with. I am not in a position to make reference these because I don't know; but they're not covered by the Counts and consequently I must, out of—I don't want to defend against something I've never heard about. For the record I object any such testimony pertaining to any patients not named or specified in the particular Counts called up for hearing today." (TR 113-114)

Then again when the first new witness was called the following objection was made:

> "MR. WATKINS: All right. May I again for the record, we were served with Complaint which alleged certain acts on individuals and I'm prepared to defend against those and I say in support of my objection that we object to her testimony. We have not been furnished her name. She is not mentioned in the Complaint and I would offer in evidence — we filed — Mr. Nesbitt indicated that I should have done some discovery. I filed a request of all the witnesses he was going to use.

This lady is not listed, mentioned in the list of witnesses which I tendered to the Court Reported that was furnished me by the Board. It is not mentioned in the Complaint whatsoever. I'm in this position as a lawyer. I don't want to defend against what I don't know may happen. We're not trying to hide it. If the Board would want to continue this and add whatever this lady is going to say as a charge, give me a chance to professionally investigate it, we'll come right back before this Board; but I don't think I can let a client be accused by some witness that has not been named in the Complaint — and this is me objecting not the doctor — we're not trying to hide it. If we could have enough time to investigate whatever this charge may be, we'll certainly come back before this Board; but I'd be professionally incompetent if I didn't object to a witness not listed, a charge not previously referred to in any of the Complaint. I would have no opportunity to investigate it on behalf of my client and I would ask — I make an objection with the understanding that one, if you want to continue this to another time until we have the chance to investigate whatever she may be asking, we'll certainly come back and give you our explanation and understanding of what this is. As a lawyer I can't stand in attempt to defend anybody on charges I don't know what they are." (TR 190-192)

And finally, after the testimony of the last surprise witness, this objection was made:

"MR. WATKINS: I can't, for the record, I can't cross-examine this witness. I am not prepared to. I will just have to withdraw my representation in the cross-examination because of the lack of preparation into it and I would ask for a continuance, again, in order that I would have an opportunity to investigate these new things which obviously came as a complete surprise to me and I can't do any good in cross-examining this witness in trying to establish what the facts are.

I never heard of young Berezney or Mr. Green in my life. I didn't know his wife was ever a patient in the hospital. I ask for a continuance. I don't presume that I'll get it. This is my thought and there is no use in my representing the doctor at this point in the hearing." (TR 455-456)

A Motion to Reopen Hearing for Additional Testimony and Evidence was filed: (App. D)

"3. To allow the Board to deliberate and determine this matter without benefit of the testimony and evidence which is now available but was not available on the last day of the hearing when witnesses appeared whose names had never before been mentioned by the Board and would constitute unfair, unreasonable and illegal conduct and action.

WHEREFORE, respondent moves this Board to grant additional hearing in order to protect the right of respondent in the matter now before the Board."

The Federal Question was raised in the briefs submitted to the Circuit Court.

The Assignments of Error raised the Federal Question. (App. C):

"3. The Court erred in entering its Order denying the Petition for Writ of Certiorari for the Order of the Board of Medical Examiners, review of which was sought in the Circuit Court, was an abuse of discretion and constituted a departure from the essential requirements of the law.

4. The Court erred in denying Appellant's Motion to Allow Taking of Testimony in accordance with the decision in the case of Francis Allston Brunson, M.D. v. State Board of Medical Examiners, (Fla. App. 1966) 186 So. 2d 276.

5. The Court erred in denying the Petition for Certiorari for the Order of the Board of Medical Examiners, review of which was sought, denied to Appellant his right under Sections 1, 4, 11 and 12, Declaration of Rights of the Constitution of the State of Florida and the 5th and 14th Amendments to the Constitution of the United States.

6. The Court erred in denying the Petition for Writ of Certiorari for the Order of Revocation entered by the Board of Medical Examiners was not based upon sufficient competent testimony and evidence and was a departure from the fundamental requirements of the law and denied to Appellant his constitutional rights."

The Federal Question was raised in the briefs submitted in the District Court of Appeal, Third District. The District Court held that there were no violations of constitutional rights, contrary to the decision of Murchason, U. S. 1955, 349 U. S. 133, which was cited and argued. This Court denied judicial review by saying, "the decision here reviewed is that of the Circuit Judge, not that of the Board." Katz v. State Board of Medical Examiners, 201 So.2d 805.

The Petition for Rehearing raised the Federal Question. (App. J)

The Federal Question was raised in both points argued in the Brief submitted to the Supreme Court of Florida on a Petition for Writ of Certiorari. The dissenting opinion rendered by Justice ADAMS acknowledged the Constitutional issue when he said, "less than a judicial review in the trial court is a denial of due process." Katz v. State State Board of Medical Examiners, 213 So.2d 714 (Fla. 1968). The Petition for Rehearing raised the Federal Question. The Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

It is the basic contention of Petitioner that procedural due process was denied him and that under the doctrine of in *Re Ruffalo*, ____ U.S. ____ 88 S.Ct. ____, and *Ewing v. Mytinger and Casselberry, Inc.*, 399 U.S. 594, 70 S.Ct. 870 (1950) review is appropriate.

The Complaint and Amended Complaint in this case listed specific persons, places, times and events which would probably be considered by the Board in determining Dr. Katz's right to continue his practice of medicine.

However, at the hearing the Respondent Board heard and considered testimony concerning new charges submitted by four surprise witnesses. While Dr. Katz presented overwhelming testimony dispelling any doubts as to improper professional conduct in relation to the allegations of the charges listed in the Complaint and Amended Complaint he was unable to defend himself against the new charges and testimony of the surprise witnesses.

A Motion to Reopen the Hearing for the purpose of taking testimony concerning the new charges was denied by Respondent. The Board refused to reopen the hearing yet the Order of Revocation specifically relied upon matters which were presented for the first time at the hearing.

A Petition for Writ of Certiorari was taken to the Circuit Court of Dade County, Florida. The Petition was denied. On an appeal to the District Court of Appeal, Third District, that Court refused to review the acts of the Board. Katz v. State Board (Supra). The Supreme Court of Florida discharged a Writ of Certiorari which it had originally granted with Justice Adams strongly dissenting. (App. H).

The facts disclose that four disgruntled patients, out of several hundred upon whom Dr. Katz had performed FAA Physicals, were certain they had not received proper physical examinations. In spite of the fact that long periods of time had elapsed since the physicals were administered, they remembered that Dr. Katz did not perform all the proper tests. One witness, Douglas Garden, said the examination did not compare with the examination he had received before entering flight training with the R.A.F. In opposition to this testimony, the Petitioner and his nurse testified the examinations were more thorough. Medical records supported Petitioner's contention.

As to the charges concerning Dr. Berezney, it should be noted that Dr. Berezney's name was first given to the Petitioner by the Florida Medical Association as a licensed doctor. The testimony presented by Dr. Katz clearly showed that he had terminated Dr. Berezney's position as a physician in his hospital upon receiving a letter from Board. One charge concerning Frederick Chatel, involved an incident which occurred prior to the Board's notice that Dr. Berezney was temporarily suspended. As to the other original charge pertaining to George Seifert, every person in the operating room from anesthesiologist to scrub nurse, testified that Dr. Katz performed the operation and not Dr. Berezney, as the Board later ruled. That was the record concerning the original charges. However, as to the other four witnesses, Dr. Katz was unable to defend himself since he had no knowledge of the acts alleged prior to the hearing. The Board's decision was based substantially on the surprise charges. Petitioner was thereby deprived of a valuable property right, the right to practice medicine and earn a living.

It is significant to note that the Florida Constitution closely parallels the United States Constitution, particularly in the area of due process of law. Justice Adams in his dissenting opinion in this case stated that due process of law had been denied on two bases. First, there had not been a full judicial review in a trial court. Second, the action exceeded the bounds of proper discipline and amounted to a taking of property by an administrative board without full judicial review.

In *Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870 (1950), Mr. Justice Douglas pointed out that a judicial determination was required where property rights were involved. Justices Douglas and Frankfurter reiterated the doctrine in *Barsky v. Board of Regents of University*, 347 U.S. 442, 74 S.Ct. 650 (1954) (see dissenting opinion). Numerous federal courts have followed these opinions, i.e., *Russell-Newman Manufacturing Company v. N.L.R.B.*, 370 F.2d 980, (5th Cir, 1966). Hornsby v. Allen, 326 F.2d 605 (5th Cir., 1964).

In *Re Ruffalo*, ____ U.S. ____ 88 S.Ct. ____ (1968) the Court held that procedural due process requires fair notice of the charges pending. The Court pointed out that such charges affecting professional life are quasi criminal in nature and that the charges must be known before the proceedings commence so they can be fairly met.

In the present case, Petitioner was denied prior notice of certain charges levied against him. Several requests for a continuance to meet those charges were denied. Respondent in fact denied the right to present testimony at a new hearing to meet the new charges. Petitioner respectfully submits that he was clearly denied his constitutional rights as elucidated in the *Ruffalo* case.

The right to work is the most precious liberty that man possesses. To be deprived of this right by an administrative agency which acts as judge, jury, prosecutor and investigator *without procedural due process of law*, constitutes a deprivation of a constitutional right. In *Re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955)

CONCLUSION

For the foregoing reasons it is respectfully submitted that Petition for Writ of Certiorari should be granted or in the alternative the decision of the Supreme Court of Florida should be reversed.

STRAUSS & McCORMICK and
MILTON E. GRUSMARK, *Of Counsel*
Suite 1104 Concord Building
66 West Flagler Street
Miami, Florida 33130

By_____
Milton E. Grusmark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida was mailed to Joseph Nesbitt, Esq., Attorney for Respondent, Suite 601 - 100 Biscayne Tower, Miami, Florida this ____ day of December, 1968.

Milton E. Grusmark

APPENDIX A

[TITLE OMITTED]

COUNT TEN

The Board charges Harry Meyer Katz, M.D., with unprofessional conduct in the practice of medicine for the reason that he did in Pinellas County, Florida, on or about June 27, 1962, perform a physical examination and render a written report thereon upon one James H. Flournoy in a grossly negligent and professionally incompetent manner. In specification whereof the Board alleges that Mr. Flournoy was being examined by Dr. Katz to ascertain whether he was physically fit to receive a third-class airman's certificate from the Federal Aviation Agency. Dr. Katz rendered a written report of his physical examination upon Mr. Flournoy in such a manner as to represent that Mr. Flournoy had been completely examined in accordance with the report when in truth and fact Dr. Katz failed to make a physical examination or inquiry of a large number of material items required by the report including but not limited to performing an audiometer, equilibrium or color blindness test and examination of Mr. Flournoy's heart, lungs, and ears.

COUNT ELEVEN

The Board charges Harry Meyer Katz, M.D., with unprofessional conduct in the practice of medicine for the reason that he did in Pinellas County, Florida, on or about

August 10, 1963, perform a physical examination and render a written report thereon, upon one Howard K. MacDonald in a grossly negligent and professionally incompetent manner. In specification whereof the Board alleges that Mr. MacDonald was being examined by Dr. Katz to ascertain whether he was physically fit to receive a third-class airman's certificate from the Federal Aviation Agency. Dr. Katz rendered a written report of his physical examination upon Mr. MacDonald in such a manner as to represent that Mr. MacDonald had been completely examined in accordance with the report, when in truth and fact Dr. Katz failed to make a physical examination or inquiry of a large number of material items required by the report including but not limited to an audiometer test, depth perception, and color blindness tests and an examination of Mr. MacDonald's lungs and ears.

COUNT TWELVE

The Board charges Harry Meyer Katz, M.D., with unprofessional conduct in the practice of medicine for the reason that he did in Pinellas County, Florida, on or about September 20, 1963, perform a physical and render a written report thereon upon one Trevor A. Jones in a grossly negligent and professionally incompetent manner. In specification whereof the Board alleges that Mr. Jones was being examined by Dr. Katz to ascertain whether he was physically fit to receive a second-class airman's certificate from the Federal Aviation Agency. Dr. Katz rendered a written report of his physical examination upon Mr. Jones in such a manner as to represent that Mr. Jones had been completely examined in accordance with the report when in truth and fact Dr. Katz failed to make a

physical examination or inquiry of a large number of material items required by the report including but not limited to performing an audiometer, equilibrium or color blindness test and an examination of Mr. Jones' heart, lungs, eyes, and ears.

COUNT THIRTEEN

The Board charges Harry Meyer Katz, M.D., with unprofessional conduct in the practice of medicine for the reason that he did in Pinellas County, Florida, on or about January 28, 1964, perform a physical examination and render a written report thereon upon one Douglas C. Garden in a grossly negligent and professionally incompetent manner. In specification whereof the Board alleges that Mr. Garden was being examined by Dr. Katz to ascertain whether he was physically fit to receive a student pilot's certificate from the Federal Aviation Agency. Dr. Katz rendered a written report of his physical examination upon Mr. Garden in such a manner as to represent that Mr. Garden had been completely examined in accordance with the report when in truth and fact Dr. Katz failed to make a physical examination or inquiry of a large number of material items required by the report including but not limited to performing an audiometer, equilibrium or color blindness test and an examination of Mr. Garden's eyes, lungs, and ears.

Now, therefore, pursuant to authority vested in it by Florida Statute 458.12 the State Board of Medical Examiners of the State of Florida hereby orders and directs that the said Harry Meyer Katz, M.D., be and appear for a hearing on the above charges at the Sarasota Motor

Hotel, Sarasota, Florida, at 9:00 a.m. on May 14, 1965. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

DONE and ORDERED by the State Board of Medical Examiners of the State of Florida this 16th day of April, 1965.

STATE BOARD OF MEDICAL EXAMINERS

By: Marjoriann H. Keebler
Marjoriann H. Keebler
Assistant Secretary

(Board Seal)

APPENDIX B

[TITLE OMITTED]

AMENDED COMPLAINT, ORDER TO APPEAR AND NOTICE OF HEARING

The State Board of Medical Examiners of the State of Florida, composed of Dr. C. D. Berry, Dr. G. H. Garmany, Dr. H. L. Pearson, Dr. E. B. Hardee, Dr. M. R. Pope, Dr. J. C. Taylor, Dr. A. T. Kennedy, Dr. S. J. Wilson, Dr. Leo Grossman, and Dr. E. H. Updike, based upon its investigation and proofs and evidence before it, and files this amended complaint against the above named physician and charges that the license to practice medicine in this State, heretofore issued to Harry Meyer Katz, M.D., should be revoked, suspended or annulled or other disciplinary action taken as authorized by the Medical Practice Act and Counts Ten through Thirteen of the Complaint and Order to Appear heretofore filed herein on April 16, 1965, is amended and supplemented by the filing of the following additional counts to wit:

COUNT FOURTEEN

On or about and between May, 1965 and September, 1965, both inclusive, Harry Meyer Katz, M.D. aided, abetted, counselled, hired or procured Paul M. Berezney, M.D. to illegally and unlawfully practice medicine and surgery. In specification whereof the Board alleges that at all times material hereto the license to practice medicine

and surgery in the State of Florida of Paul M. Berezney, M.D. was under active suspension by order of the Florida State Board of Medical Examiners for failure of the said Paul M. Berezney to properly register with the Medical Board in accordance with the Medical Practice Act, Section 458.06 (2); and additionally under active suspension by order of the Florida State Board of Medical Examiners in accordance with the provisions of the Medical Practice Act, Section 458.12 (1) (1) in that the said Paul M. Berezney was then under an adjudication of mental incompetency. In further specification whereof the Board alleges that Doctor Katz aided, abetted, counselled, hired or procured the said Paul M. Berezney, M.D. to operate on and perform surgical procedures on Frederick N. Chatel and George H. Seifert. In further specification whereof the Board alleges that Doctors Berezney and Katz did and performed the removal of a sebaceous cyst from the shoulder of Frederick N. Chatel on or about May 31, 1965 and did and performed a hemorrhoidectemy on George H. Seifert on or about July 30, 1965, all at the Pinellas General Hospital in Largo, Pinellas County, Florida.

Wherefore, by reason of the foregoing allegations Harry Meyer Katz, M.D. is guilty of violating statutes of the State of Florida relating to the practice of medicine within the intent and meaning of the Medical Practice Act, Florida Statute 458.12 (2), to wit, aiding, abetting, counselling, hiring or otherwise procuring Paul M. Berezney, M.D. to practice medicine and surgery when his medical license was then not in full force and effect within the intent and meaning of Florida Statutes. Sections 776.011, and 458.15(2)(a) and (c).

COUNT FIFTEEN

Realleging all the matters and things set out in Count Fourteen hereof making them a part of this Count Fifteen as if set out fully herein, the Board alleges that Harry Meyer Katz, M.D. is guilty of immoral or unprofessional conduct within the intent and meaning of the Medical Practice Act, Florida Statute 458.12 (1) (j).

Now, therefore, pursuant to authority vested in it by Florida Statute 458.12 the State Board of Medical Examiners of the State of Florida hereby orders and directs that the said Harry Meyer Katz, M.D. be and appear before a hearing officer, to be appointed by the Board as examiner in the above captioned matter to hear and receive such testimony and evidence as may be presented by the parties touching upon and concerning Counts Ten through Fifteen of the complaint as amended as may be presented by the parties at the New York Room of the Toffenetti Hotel, First Avenue and Second Street North, St. Petersburg, Florida, on October 25, 1965 at 1:00 P.M. If you fail to do so, judgment by default will be taken against you for the relief demanded in this amended complaint.

DONE AND ORDERED by the State Board of Medical Examiners of the State of Florida this 28th day of September, 1965.

STATE BOARD OF MEDICAL EXAMINERS

By: Marjoriann H. Keebler
Marjoriann H. Keebler
Assistant Secretary

(BOARD SEAL)

APPENDIX C

[TITLE OMITTED]

FINAL ORDER

This case came to be heard pursuant to notice on January 14 and 15, 1966 at Tampa, Florida, upon Counts Ten through Thirteen of the complaint dated April 16, 1965 and upon Counts Fourteen and Fifteen of the amended complaint dated September 28, 1965. Doctor Katz was present and represented throughout the proceeding by his attorney. The testimony and evidence presented was heard and determined by the entire Medical Board absent Doctor Homer L. Pearson who neither voted nor participated with the Board in this matter.

In Counts Ten through Thirteen Doctor Katz is charged with unprofessional conduct in the practice of medicine by reason of having made and signed medical reports for named individuals for the Federal Aviation Agency wherein he indicated he had made physical examinations upon such individuals and found them physically fit when in truth and fact Doctor Katz performed only a cursory examination or no examination at all.

All documentary proofs and exhibits which were introduced into evidence as well as those upon which testimony was presented are hereby admitted into evidence and made a part of the record of this proceeding.

Having heard the testimony and evidence presented and having observed the bearing and demeanor of the witnesses, the Board makes the following findings.

Doctor Katz examined Messrs. Flournoy, MacDonald, Jones and Garden at his professional offices on the dates alleged. The purpose for which the examinations were made was to determine whether the individuals were physically fit to receive medical certification in order to obtain flying permits from the Federal Aviation Agency for which Doctor Katz was a medical examiner. Each of these individuals appeared before us and told a similar story showing the physical examination performed upon them by Doctor Katz to be cursory, superficial or nonexistent. In each case we find that most of Doctor Katz' time was spent in checking items in the examination form so as to indicate that the patient had been examined. The deficiencies of the examinations, while not identical for each individual, were similar in showing that Doctor Katz failed to check the cardiovascular, respiratory, and otolaryngolic systems. The date secured by the physical examination required by the Federal Aviation Agency was thorough and painstaking and when properly performed would require a patient to disrobe. In no case did Doctor Katz require the patients to disrobe, yet the signed reports indicate they were checked for presence or absence of hernia, hemorrhoids, fistulas, and prostate trouble. In appearing before us Doctor Katz evidently wanted us to accept his view that a proper physical examination can be performed by observing a patient and asking him a few questions in light of his written medical history. The first physical examination performed on Mr. Jones was cursory to say the least and we find that no attempt was made to perform the second physical examination upon this patient. A physician is automatically alerted to the change in the vital organs in a patient of this age. From a diagnostic medical viewpoint a person's vital organs and sensory perception can only be evaluated by employing the standard diagnostic pro-

cedures available to the profession. When these procedures are not followed or employed a physical examination is nothing but a farcical guessing game. Doctor Katz in part attempted to justify his conduct on the fact that he charged only $10.00 for an examination. The fee that a physician charges for his services has nothing to do with the quality or competence of the services he is ethically and professionally bound to render. (The conclusion which we draw from these FAA examinations which occurred over a two-year period is that Doctor Katz' professional conduct was more than irresponsible — it was deceptive and misleading.) It was calculated to lead a patient into an unwarranted sense of security to make him think he was medically "okay". This type of practice tends to undermine the entire medical profession. A physician's signature on a medical examination whether it is for an insurance physical, employment or as here for flight certification, is usually accepted at face value as true because of the general competence and integrity of the medical profession. (From this evidence we find that Doctor Katz' conduct departed from the acceptable and minimal standards of professional conduct for physicians and in this fact constitutes the grossest type of unprofessional conduct in the practice of medicine.) We therefore find Doctor Katz guilty as charged in Counts Ten through thirteen of the complaint.

In Count Fourteen Doctor Katz is charged with violating another statute relating to the practice of medicine by reason of aiding, assisting, and promoting an unlicensed physician to practice medicine and surgery at a time when the physician was unlicensed due to mental incompetency. By reason thereof Doctor Katz is also charged by Count Fifteen with unprofessional conduct in the practice of medicine.

The evidence shows that the medical license of Paul L. Berezney was suspended by this Board in January of 1965 for his failure to make annual registration as required by the Medical Practice Act. In addition, Doctor Berezney's license to practice medicine and surgery in the State of Florida was placed under active suspension by order of this Board dated April 13, 1965, by virtue of an adjudication of mental incompetency entered by the St. Lucie County Judge's Court finding him to be a manic depressive. We find that Doctor Katz was physician in charge as well as the principal owner of the Pinellas General Hospital.

We find that Doctor Berezney removed a sebaceous cyst from the shoulder of Mr. Chattel at the hospital on May 31, 1965.

From the following evidence we find that Doctor Berezney performed a hemorrhoidectomy on Mr. Seifert at the Pinellas General Hospital on July 30, 1965 with the knowledge, approval and assistance of Doctor Katz. The day prior to the operation Doctor Berezney performed a diagnostic proctologic examination on Mr. Seifert in the presence of Doctor Katz and a resident physician. Prior to commencement of the hemorrhoidectomy Doctor Berezney appeared gowned in the operating room and announced to the operating room personnel that he was ready to proceed. Doctor Katz was not present in the operating room at that time. Following the surgery Seifert was attended in his post operative care by Doctor Berezney in the form and manner customarily assumed by an attending surgeon. Moreover, the hospital medical charts on Seifert indicate that Doctor Berezney was charted as his attending physician on many occasions. During one of his visits to Seifert,

Doctor Berezney stated he had performed the hemorrhoidectomy. All of this evidence is consistent to the point that Doctor Berezney performed the surgery on Seifert. We know that a surgeon does not dash into an operating room and perform surgery as Doctor Katz told us he did. Mr. Seifert was of the opinion that Doctor Berezney was his doctor and we agree. In addition, hospital charts alone demonstrate that Doctor Berezney practiced medicine and surgery upon this patient. It is simply incredible to think that Doctor Berezney was seeing Seifert socially on the occasions indicated in the hospital charts.

We find that Mrs. Gloria Mathis was admitted to and attended in the Pinellas General Hospital by Doctor Berezney as a medical patient and upon her discharge Doctor Berezney obtained a prescription for her which was signed by Doctor Katz, evidently due to the fact that Doctor Berezney could not write a prescription with his licence under suspension.

In June of 1965 Doctor Berezney admitted Mrs. Justina Trommer to the Pinellas General Hospital for rheumatoid arthritis. Mrs. Trommer's hospital medical charts show that she was attended both by Doctors Katz and Berezney. Mrs. Trommer told this Board that on one occasion Doctors Katz and Berezney held a joint consultation at her bedside. Mrs. Trommer stated that Doctor Berezney was her physician. On one occasion she made a partial payment to Doctor Berezney in the amount of $100.00. After Mrs. Trommer learned Doctor Berezney was unlicensed because of mental incompetency she confronted Doctor Katz with this fact at which time Doctor Katz refunded her $100.00 which she had previously paid to Doctor Berezney. *The medical statement from the Pinel-*

las General Hospital shows that Doctor Berezney was Mrs. Trommer's physician. From this evidence, we find that Doctor Katz aided and assisted and in fact made it possible for Doctor Berezney to practice medicine and surgery.

When Doctor Katz testified before this Board he admitted that he initially employed Doctor Berezney but insisted that immediately after he learned that Doctor Berezney was mentally incompetent he completely terminated Berezney's status as a physician. Doctor Katz told us flatly that he did not permit Doctor Berezney to practice medicine and surgery in the Pinellas General Hospital on or after June 6, 1965. From the evidence presented to us we find that just the opposite occurred and further find that Doctor Katz' testimony is unworthy of belief. On June 4, 1965 Doctor Katz was advised by the Director of this Board by telephone that it would be unwise for him to associate or employ Berezney. Immediately thereafter Doctor Pearson wrote Doctor Katz a letter that it would in fact be illegal to employ Berezney as a physician. From the testimony of Mr. Green we find that on June 6, 1965 Katz introduced Doctor Berezney to Mr. Green as a competent surgeon. Mr. Green further testified from records that on June 8, 1965 his wife was operated on at the Pinellas General Hospital by Doctor Berezney. Mr. Green was in fact escorted to the operating room door by Doctor Katz and witnessed Doctor Berezney performing surgery upon his wife. Following the operation Mr. Green told this Board that Doctor Berezney attended his wife in a professional capacity and upon one occasion he witnessed Doctor Berezney make an examination of Mrs. Green's abdomen. (Paul Berezney, son of Doctor Berezney who was physically present in the operating room confirmed the fact that his father in person performed a laparotomy to remove surgi-

cal adhesions from Mrs. Green's abdomen following what appeared to be a case of previous surgery followed by postoperative complications. Mr. Berezney witnessed his father from the initial incision to the end of the surgical procedure on Mrs. Green.) Mr. Berezney had driven his father to work that day because as a mental incompetent he did not have a driver's license.

Any one of these cases is sufficient to demonstrate that Doctor Katz aided, assisted or employed Doctor Berezney to practice medicine and surgery at a time when his license was not in full force and effect since he was under a disability of mental incompetency. We therefore find Doctor Katz guilty as charged in Count Fourteen of the amended complaint. From this evidence we also find Doctor Katz guilty of unprofessional conduct in the practice of medicine as charged in Count Fifteen of the complaint.

Doctor Katz has filed with us a motion asking us to hold another hearing for him to present additional evidence regarding the cases of Mrs. Mathis, Mrs. Green and Mrs. Trommer. The motion fails to advise us what new or additional evidence will be presented and how it would affect the outcome of this hearing. In any event, the motion fails to set forth that any additional matter would be presented touching upon the case of Mr. Seifert, Mr. Chattel, Mr. Flournoy, Mr. MacDonald, Mr. Garden or Mr. Jones. We are not inclined therefore to reopen the case and therefore deny this motion.

The testimony we have heard shows that Doctor Katz had no concern or regard for the health, safety or welfare of any of these individuals. He made it possible for a man to pilot an airplane without so much as checking his heart

or blood pressure. He openly assisted and permitted a manic depressive to perform major surgery (when he had been told not to) at a time when the physician was not even allowed to drive an automobile. There is no place in organized medicine or the medical fraternity for this doctor nor do we find any basis upon which to rehabilitate him into the practice of medicine. We have the responsibility to protect the public against unqualified and unprofessional conduct in the practice of medicine, and in this case we find only one way to accomplish this.

It is therefore, upon consideration, ORDERED AND ADJUDGED that Harry Meyer Katz, M.D. be adjudged guilty of violating the Medical Practice Act, Sections 458.12 (1) (j) and 458.12 (2), Florida Statutes.

It is therefore, upon consideration, ORDERED AND ADJUDGED that License No. 5457 authorizing Harry Meyer Katz, M.D. to practice medicine and surgery in the State of Florida be and the same is hereby revoked.

DONE and ORDERED by the State Board of Medical Examiners this 14th day of February, 1966.

STATE BOARD OF MEDICAL EXAMINERS

By: Leo Grossman, M.D.
Leo Grossman, M.D.
Secretary-Treasurer and Member
of the Board

(BOARD SEAL)

APPENDIX D

[TITLE OMITTED]

MOTION TO REOPEN HEARING FOR ADDITIONAL TESTIMONY AND EVIDENCE

Respondent, HARRY MEYER KATZ, M.D., by his undersigned attorneys, moves this Board to reopen the hearing held on January 14-15, 1966, in the matter of the revocation of respondent's license and to allow additional testimony and evidence to be produced on behalf of respondent, and in support of such motion says:

1. The Complaint filed herein, particularly Counts 14 and 15 of the Amended Complaint filed September 28, 1965, named specific offenses invloving two (2) persons: (1) Frederick N. Chatel and (2) George H. Seifert, and the Answers to Interrogatories filed by counsel for the Board listed only these persons in reference to Counts 14 and 15 of the Amended Complaint.

At the hearing in this matter testimony and evidence was presented concerning persons other than those named in the Complaint or in the Answers to Interrogatories, to wit: a Mrs. Gloria Mathis and a Mrs. Justinia Trummer. In addition testimony was had concerning a Mrs. Green, whose name had not been previously mentioned by the Board in either the Complaint or the Answers to Interrogatories, and testimony by Paul Berezney, Jr. not previously named.

2. Testimony of these persons was admitted over objections of counsel for respondent, and counsel had no opportunity to refute or establish proof concerning these persons. Consideration of records and conversations with people whose names were mentioned as being present at the time or event the witnesses testified about has shown material matters which should come before this Board.

3. To allow the Board to deliberate and determine this matter without benefit of the testimony and evidence which is now available but was not available on the last day of the hearing when witnesses appeared whose names had never before been mentioned by the Board would constitute unfair, unreasonable and illegal conduct and action.

WHEREFORE, respondent moves this Board to grant additional hearing in order to protect the right of respondent in the matter now before the board.

J. BEN WATKINS
of
TRUETT & WATKINS
The Title Building
Tallahassee, Florida
Attorneys for Respondent

STATE OF FLORIDA
COUNTY OF LEON

This day personally appeared before me, the undersigned officer, duly authorized to administer oaths, J. BEN WATKINS, who, being by me first duly sworn, deposes and says:

That he has read the foregoing Motion To Reopen Hearing for Additional Testimony and Evidence, and on the basis of information and belief says that such is true.

J. BEN WATKINS

Sworn to and subscribed before me
this 24th day of January, 1966.
Mary J. Livingston
Notary Public, State of Florida at Large
My Commission Expires Sept. 13, 1968
Bonded by American Fire & Casualty Co.

I HEREBY CERTIFY that copies of the foregoing Motion To Reopen Hearing for Additional Testimony and Evidence were furnished to Joseph Nesbitt, Esq., State Board of Medical Examiners, Suite 601 - 100 Biscayne Tower, 100 Biscayne Boulevard, North, Miami, Florida, and Marjoriann H. Keebler, Assistant Secretary, State Board of Medical Examiners, P. O. Box 5, Biscayne Annex, Miami, Florida, by mail, this 24th day of January, 1966.

J. BEN WATKINS

APPENDIX E

[TITLE OMITTED]

STAY ORDER

There has been presented to this Board a Motion for Supersedeas Pending Appeal of the Final Order entered herein on February 14, 1966, representing that the petitioner will promptly appeal the said order and that he will pay all costs incurred therein.

It is therefore, ORDERED that the Motion for Supersedeas be and the same is hereby granted and that the enforcement of the Final Order entered herein on February 14, 1966, be stayed during the pendency of petitioner's appeal and until the final disposition thereof, which stay is expressly conditioned upon the following terms:

1. That petitioner file his appeal papers with a proper court and with the Secretary of this Board within thirty (30) days from date of this order; and

2. That the petitioner thereafter diligently and faithfully prosecute such appeal; and

3. That petitioner be responsible for and pay all costs and expenses incurred therein.

DONE and ORDERED by the State Board of Medical Examiners this 21st day of February, 1966.

STATE BOARD OF MEDICAL EXAMINERS

By: LEO GROSSMAN
Leo Grossman, M.D., Secretary-Treasurer and Member of the Board

(BOARD SEAL)
cc: J. Ben Watkins, Esq.
Joseph Nesbitt, Esq.

APPENDIX F

FINAL JUDGMENT DENYING PETITION FOR WRIT OF CERTIORARI

"Petitioner's Motion to Allow Taking of Testimony is hereby denied.

"The Petition for Writ of Certiorari to be directed to a Final Order of the STATE BOARD OF MEDICAL EXAMINERS dated February 14, 1966 having been considered together with the transcript, and record of proceedings, briefs and oral argument of counsel for respective parties hereto, and the Court being otherwise fully advised in the premises, finds that the Respondent did not exceed its jurisdiction or depart from the essential requirements of law in making and entering its Final Order dated February 14, 1966. It is therefore, upon consideration,

"ORDERED AND ADJUDGED that the Petition for Certiorari be and the same is hereby quashed and certiorari denied.

"DONE AND ORDERED in Chambers at the Dade County Courthouse, Miami, Florida, this 26th day of August, 1966.

"/s/ Grady L. Crawford
GRADY L. CRAWFORD,
CIRCUIT JUDGE

"FLORIDA STATE BOARD OF MEDICAL EXAMINERS, 901 N.W. 17th Street, Miami, Florida 33136"

APPENDIX G

[TITLE OMITTED]

ASSIGNMENTS OF ERRORS

Appellant, HARRY MEYER KATZ, M.D., pursuant to §458.123(4), Florida Statutes, and Rule 3.5, Florida Appellate Rules, hereby assigns the following errors upon which he intends to rely for reversal of the Order appealed from:

1. The Circuit Court erred in its Order dated August 26, 1966, which denied the Petition for Writ of Certiorari.

2. The Court erred in its Order dated August 26, 1966 which denied review of the Order of the Board refusing to re-open proceedings for additional testimony and evidence.

3. The Court erred in entering its Order denying the Petition for Writ of Certiorari for the Order of the Board of Medical Examiners, review of which was sought in the Circuit Court, was an abuse of discretion and constituted a departure from the essential requirements of the law.

4. The Court erred in denying Appellant's Motion to Allow Taking of Testimony in accordance with the decision in the case of Francis Allston Brunson, M.D. v. State Board of Medical Examiners, (Fla.App. 1966) 186 So.2d 276.

5. The Court erred in denying the Petition for Certiorari for the Order of the Board of Medical Examiners, review of which was sought, denied to Appellant his rights under Sections 1, 4, 11 and 12, Declaration of Rights of the Constitution of the State of Florida and the 5th and 14th Amendments to the Constitution of the United States.

6. The Court erred in denying the Petition for Writ of Certiorari for the Order of Revocation entered by the Board of Medical Examiners was not based upon sufficient competent testimony and evidence and was a departure from the fundamental requirements of the law and denied to Appellant his constitutional rights.

TRUETT AND WATKINS
Attorneys for Appellant
822 Biscayne Building
Miami, Florida 33130

By _____
J. BEN WATKINS

I HEREBY CERTIFY that a copy of the foregoing Assignments of Errors was mailed to JOSEPH NESBITT, ESQ., Attorney for the Appellee, 601, 100 Biscayne Boulevard North, Miami, Florida, this 26th day of October, 1966.

_____
J. BEN WATKINS

APPENDIX H

IN THE SUPREME COURT OF FLORIDA,
JULY TERM, A. D. 1968

Opinion filed July 10, 1968
Writ of Certiorari to the District Court of Appeal, Third District

Edward J. McCormick of Strauss & McCormick, for Petitioner

Joseph Nesbitt, for Respondent
PER CURIAM.

Upon consideration of the petition, briefs and oral argument in this cause we conclude that the writ of certiorari was improvidently issued and should be discharged.

It is so ordered.

CALDWELL, C.J., THOMAS, DREW, THORNAL and ERVIN, JJ., concur ADAMS, J., dissents with Opinion

ADAMS, J., dissenting:

In this case petitioner, Dr. Katz, had his medical license revoked by the State Board of Medical Examiners.

The authority for the Board's action was Chapter 458, Florida Statutes, cited as the Medical Practice Act.

The charge against the doctor was basically gross negligence and allowing a doctor whose license was temporarily suspended to practice with him, which latter act was styled as immoral and unprofessional conduct.

The Board unconditionally revoked his license.

Review was sought in the Circuit Court by way of certiorari under Section 458.123, Florida Statutes.

The Circuit Court entered this judgment:

> "The Petition for Writ of Certiorari to be directed to a Final Order of the State Board of Medical Examiners dated February 14, 1966 having been considered together with the transcript, and record of preceedings, briefs and oral argument of counsel for respective parties hereto, and the Court being otherwise fully advised in the premises, *finds that the Respondent did not exceed its jurisdiction or depart from the essential requirements of law in making and entering its Final Order dated February 14, 1966.* It is therefore, upon consideration * * * affirmed." (Emphasis supplied).

Appeal was then sought to the Third District Court of Appeal, wherein the judgment was affirmed (201 So.2d 805), the Court saying:

> "It is now well settled that this court has jurisdiction to review the order of the circuit court. Section 458.123(4), Fla.Stat., F.S.A., and Brunson v. State Board of Medical Examiners, Fla.

App. 1966, 186 So.2d 276. However, the scope of review in such cases is limited. Florida State Board of Medical Examiners v. James, Fla. App. 1965, 175 So.2d 815.

"The decision here reviewed is that of the circuit judge, not that of the Board. It was the duty of that judge to examine the Board's decision and to determine whether or not such decision was rendered in accordance with the essential requirements of law. See Morris v. City of Hialeah, Fla. App. 1962, 140 So.2d 615."

The first consideration is that of jurisdiction.

Article V, Section 4, of the Constitution settles jurisdiction in this Court when the *decision* in question is contrary to a decision of the Supreme Court *on the same point of law.*

Much has been said and written on this matter in the short span of years since this Article was adopted (1956). Perhaps the ruling case on this is that of Foley vs. Weaver, 177 So.2d 221 (1965). Although here I am not dealing with the disposition of a case without an opinion it is well to keep in mind the ever present reluctance of this Court to take jurisdiction because of conflict. *It is apparent that the judicial review accorded the Medical Board's action was more restricted than has been heretofore allowed.*

When the District Court of Appeal affirmed the judgment made by the Circuit Court, it in effect, adopted the judgment of the Circuit Court as its own. I now test that

judgment against the settled holding of this Court in applying this form of certiorari to administrative boards. In Wilson vs. McCoy, 69 So.2d 659 (Fla. 1954), and cases cited therein, *it is very plain that the limited common law application of certiorari to review administrative decisions was not applicable.*

When review was sought to the Circuit Court, it was incumbent upon that Court, being the first judicial tribunal to hear the matter, to inquire into the whole record. In other words, the Circuit Court, being the trial court, should not have limited its consideration as to whether the essential requirements of law were complied with, that is power and jurisdiction, but *rather the Circuit Court was required to examine the whole record, including the evidence to determine the propriety of the hearing; whether it was free from error; the admissibility of evidence, as well as the competency of the evidence, and its legal sufficiency.* This Court has spoken on this subject many times before and the rule seems to be clearly established that the scope of the writ of certiorari is somewhat limited when reviewing inferior judicial tribunals *but in administrative boards and quasi-judicial boards the Court must determine the sufficiency, validity and competency of the evidence.* See Wilson vs. McCoy, supra; Jacksonville T. & K. W. Ry. Co. vs. Boy, 16 So. 290 (Fla. 1894); De Groot vs. Sheffield et al, 95 So.2d 912 (Fla. 1957); State vs. Furen, et al, 118 So.2d 6 (Fla. 1960); Florida Motor Lines Corporation vs. Douglass et al, 7 So.2d 843 (Fla. 1942).

In this instance it is clear that the Circuit Judge only examined the record made before the Medical Board of ascertain that the bare essential requirements of law were complied with. This is inadequate. Likewise, upon the ap-

peal to the District Court, that Court should have had the benefit of a full and proper record to give review by appeal as the Constitution provides. *Less than a judicial review in the trial court is a denial of due process.*

It is my conclusion therefore that the decision in this case is in direct conflict with the long line of decisions announced by this Court, hence we have jurisdiction.

Passing now to the question of the merits of the appeal. I am not satisfied to approve this, the most severe judgment which could be meted to this doctor. There is considerable question whether a man in one of the great professions can be deprived of his license by his fellows (a non-judicial body) under the guise of professional discipline. I am unwilling to sanction such a judgment. It doesn't help the validity of the charge to say that it is stronger by branding it as immoral and unprofessional to say that he allowed another doctor whose license was temporarily suspended to assist him.

To begin with it was obviously an inducing feature to the Legislature to pass this act to place great emphasis on the fact that this act was for the discipline of the profession for the good of society. The action taken here goes far beyond discipline and amounts to taking property by an administrative board without full judicial review. We have long held that a license to practice medicine is a property right. See State ex rel Estep vs. Richardson, 3 So.2d 512 (Fla. 1941).

For the reasons herein stated I dissent.

APPENDIX I

Office of the Clerk
SUPREME COURT OF THE UNITED STATES
Washington, D.C., 20543

November 5, 1968

Edward J. McCormick, Esquire
Suite 1104 Concord Building
66 West Flagler Street
Miami, Florida 33130

Re: *Katz v. St. Bd. of Medical Examiners*
O. T. 1968

Dear Sir:

The application for stay of enforcement of judgment pending certiorari and the memorandum in opposition thereto in the above-entitled case have been presented to Mr. Justice Black, who has returned the motion with the following endorsement:

"Denied — No adequate reason shown to support application for stay. Nov. 4, 68 Hugo L. Black"

Very truly yours,

John F. Davis, Clerk

By: Edward C. Schade

E. C. Schade
Assistant

ECS: lsr

cc: Joseph Nesbitt, Esquire
Suite 601—100 Biscayne Tower
100 Biscayne Boulevard North
Miami, Florida 33132

APPENDIX J

IN THE

DISTRICT COURT OF APPEAL

THIRD DISTRICT OF FLORIDA

CASE NO.

HARRY MEYER KATZ, M.D.,

Appellant,

vs.

STATE BOARD OF MEDICAL EXAMINERS,

Appellee.

PETITION FOR REHEARING

COMES NOW the Appellant, by and through his undersigned attorney, pursuant to Florida Appellate Rule 3.14, and respectfully petitions this Court for a rehearing.

This Court stated, in its decision confirming the Circuit Court's denial of certiorari, "The decision here reviewed is that of the Circuit Judge, not that of the Board." It was the duty of that judge to examine the court's decision and to determine whether or not such decision was rendered in accordance with the essential requirements of law.

The Appellant had sought a review of the Florida Board of Medical Examiners' revocation of his license to practice medicine. The essence of Appellant's argument before this Court was whether or not the Board failed to meet the essential requirements of the law in depriving the Appellant of his property without due process of law, and secondly, whether the punishment exceeded the gravity of the offense. It is obvious that the essential requirements of the law are the strict adherence to the constitutional guaranties of due process and that the applicable statute is to be strictly construed in favor of the licensee.

The confirming opinion of this Court reviewed the Circuit Court's decision within what it described as "limited". This must be a fiction for the Circuit Court's decision could not be reviewed unless a long look were taken of the factual findings of the Board and its legal ruling. In essence, therefore, it was the Appellant's position that the Circuit Court erred in the following manner:

1. The Circuit Court did not require the Board to meet the essential requirements of law in reference to discovery proceedings.

a) The Board did not supply the Appellant with the names of all known witnesses after Interrogatories requesting same were propounded.

b) The Board permitted the surprise witnesses to testify and thereby deprived the Appellant of his right to supply rebuttal witnesses.

2. The Circuit Judge further erred by not ruling as a matter of law that due process was denied the Appellant by permitting hearsay testimony of the alleged incompetent Dr. Berezney. "It is conceded that this point was not raised in a brief, but it was argued. This writer was not counsel of record until the week of oral argument and did not have the opportunity to present this material point in a brief."

a) Since the Board adopted the position that Dr. Berezney was incompetent, his testimony, t..erefore, was incompetent, and it was an error to permit and consider such testimony.

b) It is submitted that this error is so gross that it amounts to fundamental error and should be considered by this Court at this time.

3. The Circuit Court Judge erred in not requiring the burden of proof in criminal cases to be used by the Board.

a) This proceeding, by its nature, was quasi criminal and quasi penal.

b) It has been suggested by the First District Court of this State that the burden should be not less than that in a criminal proceeding and, therefore, the Court erred in not applying this standard.

4. The Court further erred in not recognizing that the Appellant's right of due process were denied when the Board itself determined the competency of Dr. Berezney's son.

a) The questioning and decision regarding this witness' competency was conducted behind closed doors without the presence of Appellant or his counsel.

b) No argument was permitted during this period of time by Appellant's counsel relative to the competency of this witness.

5. The Circuit Court erred in not ruling as a matter of law that Appellant's rights of due process were violated when a member of the Board who sat as judge and jury was permitted to testify as a witness and still permitted to render a decision on the merits. (This point was not raised in a brief but was argued.)

6. The Circuit Court erred in not ruling as a matter of law the decision of the Board revoking the doctor's license which was capricious, contrary to law and tantamount to cruel and unusual punishment.

Respectfully submitted,

Wm. F. Sullivan, IV

WM. F. SULLIVAN, IV
Attorney for Appellant
8101 Biscayne Boulevard—Suite 400
Miami, Florida 33138

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing was mailed to Attorney for Appellee, JOSEPH NESBITT, Esq., Suite 601, 100 Biscayne Tower, 100 Biscayne Boulevard North, Miami, Florida, this 29th day of August, 1967.

By: William F. Sullivan, IV

SUPREME COURT, U. S.

FILED
FEB 4 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 963

HARRY MEYER KATZ, M.D.,
Petitioner,

vs.

STATE BOARD OF MEDICAL EXAMINERS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOSEPH NESBITT and
WILLIAM J. ROBERTS, *Of Counsel*
Suite 601-100 Biscayne Tower
100 Biscayne Boulevard North
Miami, Florida 33132

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

HARRY MEYER KATZ, M.D.,

Petitioner,

vs.

STATE BOARD OF MEDICAL EXAMINERS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The Petitioner has omitted the opinion and decision of the District Court of Appeal, Third District, from his appendix. For this reason the Respondent has included this decision in its appendix (App. A).

JURISDICTION

The jurisdiction of this Court is improvidently invoked under 28 U.S.C. 1257 (3) because no right, title or immunity was claimed, invoked or timely raised below causing a waiver of any federal question.

FLORIDA STATUTE 120.26 (2)

> The agency shall afford all parties authorized by law to participate in an agency proceeding the right, to
>
> (2) Submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

QUESTION PRESENTED

WHETHER AN ACCUSED PHYSICIAN WAS DENIED DUE PROCESS OF LAW WHERE WITNESSES, WHOSE NAMES HAD NOT BEEN PREVIOUSLY FURNISHED TO HIM BY WRITTEN INTERROGATORIES, WERE PERMITTED TO GIVE TESTIMONY AGAINST HIM WHEN THERE HAD BEEN AN ADJOURNMENT OF AN ADMINISTRATIVE TRIAL TO AFFORD PETITIONER, THROUGH COUNSEL, AN OPPORTUNITY TO CONFER WITH THE WITNESSES PRIOR TO THEIR GIVING TESTIMONY AND THEN NO OBJECTION WAS ENTERED OR LODGED AGAINST THEIR TESTIMONY UNTIL THEY HAD COMPLETED TESTIFYING.

STATEMENT OF THE CASE

Petitioner HARRY MEYER KATZ was charged in Counts Ten, Eleven, Twelve and Thirteen of the Complaint with unprofessional conduct in the practice of medicine by reason of making fraudulent FAA examinations (App. A). It is important to a complete understanding of this cause to realize that no assault is made by Petitioner upon any of those counts or the sufficiency of the testimony and evidence to sustain and support the counts. Assuming, *arguendo*, the validity of Petitioner's contention there could only logically and properly be a partial reversal of the cause which under the law of the State of Florida would leave Petitioner's license revoked and in effect leave him in the same position he is now in.

In addition to the above counts, Petitioner was additionally charged by Counts Fourteen and Fifteen with aiding, abetting, counselling, hiring or otherwise procuring an unlicensed and incompetent physician (a manic depressive) to practice medicine and surgery at a hospital owned and operated by Petitioner (App. B). The penultimate charges charged him simply with aiding and abetting an unlicensed, incompetent physician to practice medicine. In the preamble to the actual accusation the names of two patients upon whom medicine and surgery was practiced are mentioned. At this point it is important to emphasize that the Petitioner does not contend that the accusation with respect to the two named patients or the evidence in support thereof was not competent or substantial to support the charges and allegations against Petitioner. Again, assuming *arguendo* the validity of Petitioner's contention, the most that he could expect from the aid of this Court would be a partial reversal which

under the law of the State of Florida would leave him in the same position he now finds himself in. Petitioner's assault on the judgment of revocation, specious though it is, is much more *rarified*. The entire thrust of his contention is simply that he was not furnished with the names of material witnesses who testified against him in respect to Counts Fourteen and Fifteen. Specifically, Petitioner claims he was faced with surprise witnesses and denied due process of law because JUSTINA TROMMER and GLORIA MATHIS testified against him with respect to Counts Fourteen and Fifteen of the Amended Complaint. The Respondent has not been favored with an index to the record in this cause now lodged before this Court but will concede that prior to the administrative trial Petitioner, through counsel, requested a list of witnesses by the vehicle of written interrogatories. Written answers to those interrogatories were served upon Petitioner's counsel and it is conceded that the answers to interrogatories did not contain the name of either JUSTINA TROMMER or GLORIA MATHIS. When GLORIA MATHIS and JUSTINA TROMMER were called, Petitioner, through counsel, objected to their testimony (R 190-201). Petitioner's objection resulted in a recess and conference for the purpose of permitting Petitioner's counsel to confer with and interrogate both witnesses (R 201). After the recess and conference both witnesses were called and gave testimony against Petitioner upon Counts Fourteen and Fifteen. Neither Petitioner nor his counsel objected to their testimony (R 202-214). After the witnesses were excused and later in the hearing Petitioner complained of their testimony and moved to strike it from the record. Thus Petitioner waived any objection to the witnesses' testimony and failed to timely or properly raise and preserve any federal question.

Next, Petitioner complains of the testimony given by PAUL LAWRENCE BEREZNEY (son of the unlicensed, incompetent physician) and that of RAYMOND ALLEN GREEN. Again it is true that neither the Complaint nor the witness list furnished in the answers to interrogatories contained the names of PAUL LAWRENCE BEREZNEY or RAYMOND ALLEN GREEN. However, these witnesses were simply used and employed as rebuttal witnesses. To the Complaint and Amended Complaint (App. A and B), Petitioner filed a Motion to Quash and an Answer in the nature of a general denial (R 110-111). At the trial, however, he attempted to mitigate and explain the employment of the unlicensed and incompetent physician in the role of a "surgical technician" rather than in the role of "physician." Thus, Petitioner admitted the physical presence and working of the individual but denied he rendered services in the traditional role of a physician and surgeon. To refute this testimony it was perfectly proper for the BOARD to call PAUL LAWRENCE BEREZNEY and RAYMOND ALLEN GREEN as rebuttal witnesses. Suffice it to say that these witnesses completely dispelled the employment and utilization of the incompetent and unlicensed physician as a "surgical technician."

The Final Judgment of Revocation entered by the Respondent shows that the Respondent sitting as the trier of fact rejected the testimony presented by the Petitioner and accepted that which was offered against him. In addition, the Order correctly recites hospital records and charts which demonstrate that the unlicensed, incompetent physician was charted as a treating and consulting physician. Under the common law and Florida practice rebuttal witnesses need not be divulged in advance of

their actual use for to do so would destroy their effectiveness. The use of rebuttal witnesses is expressly permitted by *Florida Statute* 120.26 (2).

THE FEDERAL QUESTION WAS NOT RAISED

As pointed out in the Statement of the Case, Petitioner initially objected to the testimony of GLORIA MATHIS and JUSTINA TROMMER and ultimately objected to their testimony and moved to strike the same. However, at the critical period just following his conference after a recess for that purpose, the Petitioner, through his counsel, did not object to their testimony until they were excused from attendance. There was, therefore, no federal question raised or presented. Under these circumstances, the Petition for Writ of Certiorari should be denied. *Zucht* v. *King*, 260 U. S. 174 and *Palmer Oil Company* v. *Amerada Corporation*, 343 U. S. 390.

The orders and decisions of the Florida courts show on their face that no federal question was presented or decided by those courts for the reasons and matters above referred to. (See App. F and H and Respondent's App. A) There was no federal or state question of due process of law to be decided by the courts of Florida because none was raised and the objection to the use of the testimony was waived.

REASONS FOR DENYING THE WRIT

No federal question was timely or properly presented below. Any objection to the Respondent's witnesses in chief were cured and waived because Petitioner, through counsel, interrogated the witnesses at a recess called for that purpose and thereafter did not object to their testimony until after they had completed testifying and had been excused from further attendance as witnesses. The use of rebuttal witnesses was perfectly proper to dispell the Petitioner's affirmative defense.

This case turns upon the facts and circumstances of this record rather than the denial of any federally constituted right of the Petitioner.

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida was mailed to Strauss & McCormick and Milton E. Grusmark, of Counsel, Attorneys for Petitioner, Suite 1104 Concord Building, 66 West Flagler Street, Miami, Florida, 33130 this 3 day of February, 1969.

William J. Roberts

William J. Roberts

APPENDIX A

IN THE

DISTRICT COURT OF APPEAL

OF FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1967

CASE NO. 66-902

HARRY MEYER KATZ, M.D.,

Appellant,

vs.

STATE BOARD OF MEDICAL EXAMINERS

Appellee.

Opinion filed August 15, 1967.

An Appeal from the Circuit Court for Dade County, Grady L. Crawford, Judge.

William F. Sullivan, IV, for appellant.

Joseph Nesbitt, for appellee.

Before CHARLES CARROLL, C.J., and HENDRY, J., and DURDEN, WILLIAM L., Associate Judge.

HENDRY, Judge.

Appellee, Florida Board of Medical Examiners, instituted proceedings against the appellant, Harry Meyer Katz, M.D., pursuant to §§458.12(1)(j) and 458.121, Fla.Stat., F.S.A. of the Medical Practice Act. After notice and hearing, appellant's license to practice in Florida was revoked by the Board. Appellant filed a petition for writ of certiorari to review the final order of revocation as provided in §458.123(1), Fla. Stat., F.S.A., which petition was denied by the Circuit Court of Dade County. The instant appeal followed.

It is now well settled that this Court has jurisdiction to review the order of the circuit court. Section 458.123(4), Fla. Stat., F.S.A., and Brunson v. State Board of Medical Examiners, Fla.App. 1966, 186 So.2d 276. However, the scope of review in such cases is limited. Florida State Board of Medical Examiners v. James, Fla. App. 1965, 175 So. 2d 815.

The decision here reviewed is that of the circuit judge, not that of the Board. It was the duty of that judge to examine the Board's decision and to determine whether or not such decision was rendered in accordance with the essential requirements of law. See Morris v. City of Hialeah, Fla.App.1962, 140 So.2d 615.

On the basis of the record before us, we find no error in the decision of the circuit judge. Accordingly, we affirm.

Affirmed.